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In The
Supreme Court of the United States

DEMERST B. SMIT, in his official capacity as the Commissioner of the Virginia Department of Motor Vehicles,

Petitioner,

v.

YAMAHA MOTOR CORPORATION, U.S.A. and JIM'S MOTORCYCLE, INCORPORATED, d/b/a ATLAS HONDA/YAMAHA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

JUDITH WILLIAMS JAGDMANN
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

MATTHEW M. COBB
ERIC A. GREGORY
JOEL C. HOPPE
Associate State Solicitors General

RICHARD B. CAMPBELL
MAUREEN RILEY MATSEN
Deputy Attorneys General

JEFFREY A. SPENCER
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the Petitioner

July 15, 2005

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The Second Paragraph of *Virginia Code* § 46.2-1993.67(5) allows any existing franchised motorcycle dealer to file a protest as to the establishment of a new dealership for the same line-make. Although this statute does not discriminate against interstate commerce on its face or in its practical effect and although it is distinguishable from statutes previously invalidated by this Court, the United States Court of Appeals for the Fourth Circuit declared that it violated the Dormant Commerce Clause on its face. This Petition presents the following questions:

1. When a statute does not discriminate against interstate commerce on its face or in its practical effect, is it necessary to apply the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)?

2. When a statute does not discriminate against interstate commerce on its face or in its practical effect, may a federal court entertain a facial challenge to the statute using the *Pike* balancing test?

PARTIES TO THE PROCEEDINGS

The Petitioner, Demerst B. Smit, is the Commissioner of the Virginia Department of Motor Vehicles.[1] In that role, the Commissioner is responsible for the interpretation and enforcement of Virginia's statutes regulating franchise relationships between motorcycle dealers and manufacturers, *Virginia Code* §§ 46.2-1993.64 through 1993.74. In particular, he is responsible for the interpretation and enforcement of the Second Paragraph of *Virginia Code* § 46.2-1993.67(5), which is at issue in these proceedings.

There are two Respondents. First, Yamaha Motor Corporation, U.S.A., a California corporation, distributes motorcycles and related parts and accessories throughout the United States. In the lower courts, this party initiated the proceedings and was opposed to the position of the Commissioner.

Second, Jim's Motorcycle, Inc., d/b/a Atlas Honda/Yamaha, is a Virginia corporation. Using the name Atlas Honda/Yamaha, Jim's Motorcycle, Inc. maintains a Yamaha dealership in Bristol, Virginia. This is one of twenty-six authorized Yamaha dealerships in Virginia. In the lower courts, this party was aligned with the Commissioner. It is anticipated that this party will file a cross-petition seeking realignment with the Commissioner.

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[1] When these proceedings were commenced, Asbury W. Quillian was the Commissioner. Commissioner Quillian was replaced by Commissioner Smit while the litigation was pending in the district court.

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PETITION FOR A WRIT OF CERTIORARI

Demerst B. Smit, in his official capacity as the Commissioner of the Virginia Department of Motor Vehicles ("the Commissioner"), by and through his counsel, Virginia Attorney General Judith Williams Jagdmann, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Reversing the district court, the court of appeals held that the Second Paragraph of *Virginia Code* § 46.2-1993.67(5) ("the Second Paragraph") – which allows any existing franchised motorcycle dealer to file a protest as to the establishment of a new dealership for the same line-make – is facially unconstitutional. Although the lower court concluded that the statute does not discriminate against interstate commerce on its face or in its practical effect and although it is distinguishable from statutes previously invalidated by this Court, the Fourth Circuit found that the incidental burdens on interstate commerce outweigh the benefits to Virginia and, thus, the Second Paragraph violates the Dormant Commerce Clause.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is both published and reported as *Yamaha Motor Corp. U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560 (4th Cir. 2005). It is reprinted in the Appendix at 1. The decision of the United States District Court for the Eastern District of Virginia is both published and reported as *Yamaha Motor Corp., U.S.A. v. Smit*, 276 F. Supp.2d 490 (E.D. Va. 2003). It is reprinted in the Appendix at 25. The decision of the Supreme Court of Virginia, answering questions certified to it by the district court, is both published and reported as *Yamaha v. Quillian*, 571 S.E.2d 122 (Va. 2002). It is reprinted in the Appendix at 76.

JURISDICTION

The decision of the court of appeals was entered on March 18, 2005. The Chief Justice, as Circuit Justice for the Fourth Circuit, extended the period in which to file a Petition for a Writ of Certiorari to July 15, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This petition involves the following constitutional and statutory provisions:

1. The Commerce Clause, U.S. Const. art. I, § 8, cl. 3 provides:

   The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

2. *Virginia Code* § 46.2-1993.67(5) provides, in pertinent part:

   It shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or their representatives:

   . . . .

   5. To grant an additional franchise for a particular line-make of motorcycle in a relevant market area in which a dealer or dealers in that line-make are already located unless the franchisor has first advised in writing all other dealers in the line-make in the relevant market area. No such additional franchise may be established at the proposed site unless the Commissioner has determined, if requested by a dealer of the same line-make in the relevant market area within thirty days after receipt of the franchisor's notice of intention to establish the additional franchise, and after a